IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1046 OF 2006
WITH
CIVIL APPLICATION NO. 1911 OF 2006

Smt. Kashibai D/o Bhairu Kirgat ..Appellant

Vs.

Ashok Narsing Shinde (deceased)
1.A. Kusum Ashok Shinde and ors. ..Respondents

Mr. Manoj S. Chatage i/by Mr. S.D. Dharmadhikari for appellant.

Mr. R.S. Kate for respondent Nos.1(A) to 1(D).

CORAM: B.H. MARLAPALLE, J.

Date : April 02, 2007.

P.C.:

1. Heard the learned counsel for the appellant-original defendant no.1 in Regular Civil Suit No. 106 of 1993. The said suit was filed for redemption of mortgage deed and recovery of possession of the suit property, namely, the house property in City Survey No. 1735/1 which was given in mortgage to the

defendant no.1 by plaintiff no.2 i.e. Narsing Babaji Shinde on 20/9/1985 as he had obtained loan of Rs.15,000/- from the defendant no.1 and as a security he had mortgaged the suit house. Plaintiff No.1 is the son of plaintiff no.2. The suit property consists of five rooms and from the date of mortgage the defendant no.1 was occupying one room and defendant nos.2 to 5 were taken as tenants in the remaining four rooms, consequently the defendant no.1 was receiving rent from all these tenants. There was a partition between the plaintiffs of the residential properties, namely, City Survey Nos.1735, 1735/1, 1729 and 595. By registered Partition Deed executed on 5/4/1990 the suit property had gone to the share of plaintiff no.1 and, therefore, he gave up his claim in the remaining three joint family properties. The plaintiff no.1, therefore, claimed that the registered partition deed gave him a right to get the suit property redeemed from defendant no.1 and on the basis of his offer to repay the mortgage amount of Rs.15,000/- to the defendant no.1. The defendant no.1 filed her Written Statement at Exh.15 and contended that the suit was premature as the mortgage period was between 20 to 25

years and secondly the suit property was the self acquired property of plaintiff no.2 and, therefore, it could not have been partitioned and the plaintiff no.1 could not claim any right on the said property. On assessing the evidence adduced by both the parties, the trial court, while decreeing the suit, held that (a) the plaintiff no.2 had mortgaged the suit property in favour of the defendant no.1 on 20/9/1985 for Rs.15,000/-, (b) plaintiff no.2 had given the right of redemption in favour of plaintiff no.1 by partition deed dated 5/4/1990, (c) the plaintiff no.1 had shown his readiness to redeem the suit property, (d) that the suit property was not self acquired property of plaintiff no.2, (e) the suit was not premature and (f) the plaintiffs were entitled for redemption of suit property as well as the mesne profits.

2. The defendant no.1 filed Regular Civil Appeal No. 27 of 1998 against the Judgment and Decree dated 23/10/1997 passed by the learned Joint Civil Judge, Junior Division, Sangali. Before the Lower Appellate Court an additional issue was taken by the defendant

no.1, namely, she was staying with plaintiff no.2 as his wife and the partition could not have been done to her exclusion. On hearing both the parties and on reassessing the evidence adduced before the trial court, the learned Judge of the Lower Appellate Court agreed that the plaintiffs had acquired the right of redemption of the mortgage in pursuance of the partition deed dated 5/4/1990, that the suit was not premature and that the plea of marriage between the defendant no.1 and plaintiff no.2 could not be taken up in appeal in the absence of reliable evidence. The defendant no.1 had claimed that on 29/1/1997 she was married to plaintiff no.2 and he died while the appeal was pending i.e. on 6/10/2002. She, therefore, claimed that she became, subsequently, one of the LRs of the plaintiff no.2 and, therefore, was entitled for share to the property of plaintiff no.2. In support of her claim that she was married to plaintiff no.2, she had produced certain photographs along with the appeal memo, but no application was made for production of documents by way of additional evidence and consequently these photographs could not be relied.

3. The plaintiffs had examined in support of their case P.W.1 Kusum Shinde, the wife of plaintiff no.1. The partition deed was brought on record at Exh.42 and it was duly proved. The mortgage deed dated 20/9/1985 was brought on record at Exh.48. The property extract was brought on record at Exh.39 and the partition deed itself had given a right of redemption in favour of plaintiff no.1 in respect of the property which had gone to his share i.e. the suit property by way of partition. The mortgage deed at Exh.48 stated about the consideration amount of Rs.15,000/- which was agreed to be paid in cash within 20-25 years. Both the courts below concurrently held that the said recital would not mean that the mortgage period was agreed to be 20 years and that the mortgager had to get the property redeemed only after the expiry of 20 years. The intention of the parties would be to have a repayment period of 20 years but that would not mean that the plaintiffs were prevented from initiating the suit for redemption of the

mortgage property when the property was handed over to the defendant no.1 as a security for the amount of loan advanced. The view taken by both the courts below is based on the oral and documentary evidence placed before the trial court by the respective parties and on assessing the said evidence, the view taken by both the courts below cannot be termed as perverse or illegal. The important clause in the mortgage deed at Exh.48, which has been reproduced in the Judgment of the trial court, clearly indicated that the limit of 20-25 years was only set out for repayment of the loan amount and it did not prevent the plaintiffs from seeking redemption of the mortgage property. The said clause reads as under:-

4. The evidence of the defendant no.1 in terms of

her own depositions and the depositions of D.W.2 Gaurihar, who was the scribe of the mortgage deed at Exh.48, could not in any way support her case to defeat the suit. Under these circumstances, no substantial question of law arises for consideration in this second appeal and hence the same must fail at the threshold.

5. The second appeal is hereby dismissed in limine.

6. The Civil Application No. 1911 of 2006 does not survive and the same shall stand disposed as such.

(B.H. Marlapalle,J.)